No. 95-1873

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

GUY E. ADAMS, *et al.*,

Petitioners,

v.

CHARLIE FRANK ROBERTSON and LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Alabama

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INTRODUCTION

This action was brought as a claim for money damages based upon the common-law fraud of Respondent Liberty National Life Insurance Company ("Liberty National") and remains a monetary claim at its core. Under both this Court's decision in *Phillips Petroleum v. Shutts* and the balancing test of *Mathews v. Eldridge*, when individual *in personam* claims for money damages are foreclosed in a class action, due process requires that class members be afforded the right to opt out.

Respondents' principal method of evading these clear precedents, and the historical teachings that demand individual control over *in personam* money damages claims, is to mischaracterize this action as declaratory or injunctive in nature. But Respondents do not, and cannot, rebut the essential facts here. The complaint originally asserted claims for *money* damages; the complaints filed outside the class by Class Counsel and others for policyholders who held the same claims sought money damages *only*; and the class action settlement extinguishes class members' substantial money damages claims. See *Liberty National Life Ins. Co. v. McAllister*, 675 So. 2d 1292 (Ala. 1995) (Pet. App. 137a-39a) (compensatory damages of $1,000). Surely the constitutional right to opt out, and the analogous federal and state Rule 23 procedures, *see, e.g.*, Fed. R. Civ. P. 23(c)(2) and Ala. R. Civ. P. 23(c)(2), cannot be obliterated merely by labeling a settlement foreclosing monetary claims as "injunctive" or "declaratory." *See* Br. of Trial Lawyers for Public Justice at 13.

Respondents also claim that Petitioners have no right to opt out under *Shutts* because Petitioners were not "absent" class members, but rather consented to the jurisdiction of the Alabama court by objecting to the settlement. Petitioners were, of course, "absent" at the key

point in this case – when class counsel negotiated away Petitioners' opt out rights. A rule limiting the *Shutts* opt out right only to those who enter no appearance at all in the forum state makes no sense because it would require a collateral attack on the settlement before a class member could pursue an individual lawsuit. In any event, Respondents' argument misreads *Shutts*, which, although it permitted state courts to have a nationwide jurisdictional reach, refused to extend that reach, as a matter of due process, to *any* class member who had not been given, among other things, the right to opt out. 472 U.S. at 810-13.

Finally, Respondents have turned on its head the historical underpinning of the modern damages class action. Mandatory class actions have a long pedigree in Anglo-American jurisprudence, but that does not support Respondents' efforts to foreclose class members' claims for money damages here by eviscerating their opt out rights. Class actions for *in personam* money damages were impermissible at common-law, and the only monetary relief accorded on a class basis was *in rem*, where numerous claimants were seeking relief from a limited fund or other fixed *res*. Thus, history teaches that *individual* monetary relief may only be foreclosed by a class judgment where the class members may opt out and pursue their own damages claims. *Cf.* Fed. R. Civ. P. 23(c)(2) and Advisory Committee Notes thereto.[1]

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[1] Respondents assert that this Court lacks jurisdiction because Petitioners did not properly raise their due process claim below, although neither Respondent mentioned this argument at the certiorari stage. Petitioners unquestionably argued both before the trial court and the Alabama Supreme Court that due process requires a right to opt out. Indeed, certain of the Petitioners sought intervention below *solely* to assert opt out rights. (J.A. 93-126). Petitioners' objections included the failure to afford opt out rights (*see, e.g.*, J.A. 190-245), and they briefed the issue in the trial court (Index to the Clerk's Record, "Index of Miscellaneous Boxes," Box #3) and in the Alabama Supreme Court, both in their initial appeal (Pet. Br. to Ala. S. Ct. at 21-25) and on rehearing (Pet. App. for Rehearing at vi, 1-3, 7-12). As Respondent Robertson admits (Rob. Br. at 17 n.13), the due process/opt out issue was raised by Petitioners with sufficient clarity to compel Respondents to address the issue in their own briefs to the Alabama Supreme Court. In light of the presentation of the issue below, the Alabama Supreme Court's failure to address the opt out issue in terms of due process does not oust this Court of jurisdiction. Robert L. Stern, et al., *Supreme Court Practice*, § 3.17 at 122-23 (7th ed. 1993) and cases cited therein.

ARGUMENT

A. Under *Shutts* the minimum due process required to bind class members with respect to claims "wholly or predominately" for money damages includes the right to opt out.

1. The *Shutts* right to opt out does not hinge solely on consent to personal jurisdiction.

Respondents' assertion that *Shutts* was concerned solely with providing out-of-state class members an opportunity to consent to the exercise of personal jurisdiction by a distant court is incorrect. Although there is jurisdictional language in *Shutts*, that part of the Court's analysis concerned the predicate question: What is the geographical reach of a state court over class members who do not have "minimum contacts" with the forum? The Court held that the potential reach was, in fact, nationwide, but recognized that absent plaintiffs have a separate constitutional interest in controlling their own inherently individual claims. Thus, in delineating the appropriate standards for binding absent class members in money damages cases, the Court held that, "at a minimum," *all* absent class members must be given notice

and an opportunity to opt out. 472 U.S. at 812. The due process requirement that absent class members be afforded an "opportunity to present their objections" at class proceedings, *id.*, has nothing to do with consenting to the exercise of personal jurisdiction, and everything to do with preserving individual monetary claims. Indeed, as Petitioners noted in their opening brief – and Respondents have not disputed – if lack of contact with the forum state were the *sine qua non* of the minimal due process protections accorded in *Shutts*, then the Court would have stated that the rights of residents of Kansas (the forum state in *Shutts*) could have been disposed of without even those minimal protections.[2]

In addition, the very fact that the holding of *Shutts* was limited to class actions seeking predominately money damages demonstrates that the Court was addressing due process concerns broader than those raised by limitations on personal jurisdiction. *See id.* at 811 n.3. If the Court had been concerned *only* with the exercise of personal jurisdiction over class members lacking contacts with the forum state, there would have been no reason to differentiate between actions for damages and those seeking equitable relief, because, to the extent that a state court lacks personal jurisdiction over a class member, it cannot adjudicate that person's rights no matter what remedy is sought.

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[2] If Respondents were correct that *Shutts* applies only to class members who lack jurisdictional contacts, class members with such contacts might not even be entitled to adequate representation, one of the due process protections set out in *Shutts*. Such a ruling would be at odds with this Court's precedents. *See Hansberry v. Lee*, 311 U.S. 32 (1940); *Richards v. Jefferson County*, 116 S. Ct. 1761 (1996).

2. The out-of-state Petitioners did not waive their right to opt out by objecting to the fairness of the settlement.

Even assuming *Shutts'* reasoning were limited to constraints on personal jurisdiction, there are several reasons why Respondents are not correct that the out-of-state Petitioners waived their right to contest the exercise of personal jurisdiction by participating as objectors in the Alabama trial court. First, it is well settled that constitutional rights cannot be lost except through knowing and intelligent waivers. *See, e.g., Edwards v. Arizona*, 451 U.S. 477, 483 (1981); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Waiver will not be "lightly presumed," and a court must "indulge every reasonable presumption against waiver." *Id.* at 464. Here, any alleged "waiver" by the out-of-state Petitioners of their objections to the exercise of personal jurisdiction over them in Alabama was anything but "knowing and intelligent." Not only did the class notice fail to apprise those Petitioners that they would lose a constitutional objection by appearing in Alabama, it affirmatively informed them that, *unless they appeared*, they would "be deemed to have waived all such objections and any other objections relating to the subject matter of the litigation of the Settlement, and . . . be barred forever from raising such objections or relitigating [their] individual claims in this or any other action or proceeding." (J.A. 300-02).

Second, Respondents' position requires out-of-state litigants to rely entirely upon collateral attacks to protect their rights even in cases such as this one, where an anti-suit injunction entered by the Alabama court subjects them to contempt of court for filing suit against Liberty National in another forum. In any event, out-of-state Petitioners would be forced to make the Hobson's choice between asserting *only* their right to opt out by collateral

attack, or waiving that right and challenging *only* the merits of the settlement in a distant forum. Respondents do not, and cannot, justify a rule that would encourage the filing of collateral attacks rather than encourage the resolution of all issues – including whether a right to opt out exists – in one proceeding.[3]

Third, any claim that nonresident petitioners waived their right to opt out is at odds with modern civil practice, exemplified both by Federal Rule of Civil Procedure 12(b)(2) and its Alabama counterpart, which permits a party to challenge personal jurisdiction at the outset of the case and also to participate fully in all aspects of the merits of the litigation if the challenge to personal jurisdiction is rebuffed, without waiving the personal jurisdiction challenge. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1351 at 261 (2d ed. 1990). Similarly here, Petitioners sought the right to opt out in order to pursue their own litigation, but alternatively challenged the settlement on its merits. In short, any rejection of Petitioners' constitutional right to opt out predicated on the need for a "special appearance" to challenge jurisdiction is contrary to modern practice. *See id.* § 1362 at 450-51.

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[3] The absurdity and unfairness of such a result is highlighted by the current split in the federal circuit courts of appeal regarding the necessity that absent objecting class members must have intervened in the trial court in order to have standing to appeal from a judgment approving a class settlement. *Compare, e.g., Carlough v. Amchem Products,* 5 F.3d 707 (3rd Cir. 1993) (intervention not required) *with, e.g., Guthrie v. Evans,* 815 F.2d 626 (11th Cir. 1967) (class member who was not named plaintiff did not have standing to appeal final judgment). Respondents' suggested rule would prevent distant class members even from seeking the limited relief of moving for the right to opt out in the forum in which the class action is pending.

Finally, the appearance of the nonresidents, like that of all Petitioners, to seek the right to opt out, reflected anything but consent to the lawsuit. Wishing to preserve all objections, as the class notice required, the out-of-state Petitioners also urged various arguments in opposition to the fairness of the settlement, so as not to waive such objections in the event their opt out rights were denied. Thus, it is sophistry to argue that Petitioners were not "absent" class members under *Shutts*. In stark contrast to the Class Representative, they were "absent" from the case at the most critical point – when the settlement crushing their opt out rights was negotiated.

3. The class settlement "seeks to bind known plaintiffs concerning claims wholly or predominately for money judgments."

Respondents' argument that *Shutts* is inapplicable because this action is one primarily seeking equitable or injunctive relief flies in the face of (1) the monetary nature of class members' fraud claims, (2) class members' undisputed out-of-pocket monetary losses and compensatory damages, (3) the Class Representative's own initial claim for money damages in both his complaint and motion for class certification and (4) the monetary damages sought by policyholders in cases outside the class, including cases filed by Class Counsel. Ignoring or misstating the facts regarding class members' claims for monetary damages, Respondents hide behind the equitable relief they manufactured and the state courts' perfunctory approval of that relief to circumvent the due process requirement of an opt out in actions seeking predominately monetary damages.

Respondents would have this Court believe that only class members who had cancer sustained damages, although all 400,000 members of the class have fraud

claims for money damages.[4] Moreover, all 206,000 class members like Petitioners whose cancer policies were exchanged (Tr. 494) have undisputed out-of-pocket losses due to payment of premiums for the new policies.[5] The testimony of Robertson and Class Counsel confirming these out-of-pocket losses belies Robertson's contention that these out-of-pocket losses are "questionable" and "prospective". (Rob. Br. at 25). Respondents totally ignore Petitioners' substantial claims for mental anguish.[6] Class members who had cancer and made claims under their

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[4] In Alabama, a fraud plaintiff may either rescind the transaction and sue for a refund of money spent, or affirm the contract and sue for damages. *Glass v. Cook*, 257 Ala. 141, 56 So. 2d 505 (1952); *Kennedy v. Collins*, 25 Ala. 503, 35 So. 2d 92 (1949); *Day v. Broyles*, 222 Ala. 508, 133 So. 269 (1931).

[5] Respondents falsely assert that, in order to recover claims for inflated premiums, class members must show that they received less total coverage under the new policies. (L.N. Br. at 31; Rob. Br. at 25 n.25). Respondents do not contest that Liberty National fraudulently switched policyholders into higher age bands which further inflated premiums. (Pet. Br. at 4 n.3) This aspect of class members' damages, which the state courts completely ignored, has nothing to do with whether the new policies had "better" coverage. Moreover, the Alabama Supreme Court has held that the payment of premiums for the new cancer policies under these circumstances was damage. 675 So.2d at 1298 (Pet. App. 147a). The undisputed evidence established the significance of the out-of-pocket losses for premiums – between 1987 and 1993 alone, the inflated premiums paid on a single policy totaled over $500 when the policyholder was only four years older at the time the policy was exchanged. (J.A. 545-46).

[6] *See Duck Head Apparel Co. v. Hoots*, 659 So. 2d 897, 906-08 (Ala. 1995) (upholding very substantial compensatory awards for mental anguish in fraud action).

new policies have additional compensatory damage claims.[7]

Since Respondents cannot rely upon the facts to support their position, they urge this Court to defer to the findings of the Alabama courts that the case was primarily injunctive and that the claims for premiums were de minimis. After *Shutts*, the question of whether an action primarily concerns "money damages" obviously cannot be left to the unbridled discretion of state courts, which have an interest in approving settlements that will clear numerous claims from their dockets. Moreover, this Court is not required to take the findings of a state court at face value where the undisputed evidence is to the contrary, and particularly where, as here, (1) the record reflects that the case was settled before certification (Pet. Br. at 8-9 n.7), (2) the class was certified without opposition by the defendant (*id.*), (3) the record points to inadequate representation (*see id.* at 28 n.14), and (4) Class Counsel is known to enjoy a special standing in the chosen forum, *see* Br. Attorney General of Alabama at 11.

Robertson's effort to bolster the state court's approval of equitable relief on the ground that a classwide damages remedy would bankrupt Liberty National is without any support in the record. Similarly, Respondents' contention that class members' claims for punitive damages can be asserted only at the expense of

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[7] Robertson's statement that only two of the current Petitioners had cancer and submitted claims is incorrect. The affidavit cited is only a summary of the claims which Liberty National had analyzed as of the fairness hearing (Tr. 590) and does not purport to be a list of all objectors who submitted claims. For example, among the 51 policies issued to the Adams petitioners, claims were made under 9 policies.

other class members is fallacious. As Robertson acknowledges in his brief, Alabama has a procedure to limit punitive damages if the maximum punishment constitutionally permissible has been awarded against the same defendant for the same wrong. (Rob. Br. at 27).

The traditional reasons for maintaining a mandatory class are not present here and the settlement does not afford "appropriate final relief" as Liberty National suggests. (L.N. Br. at 30). Releasing class members' fraud claims for monetary damages in exchange for a reformation of their policies which *requires* them to *continue* to do business with the wrongdoer in order to obtain any relief at all and which further allows the wrongdoer to continue to collect fraudulently inflated premiums is anything but "appropriate".[8]

In all their efforts to mischaracterize this action as "equitable," Respondents have failed to articulate any countervailing interests supporting mandatory class certification here. If, in fact, there were equitable aspects of this case which required a remedy, nothing prevented the settlement from being structured as a mandatory class only as to any such claims for equitable relief but as an opt-out class with respect to the monetary claims.[9]

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[8] Furthermore, many state courts have held that common-law fraud claims are not ever appropriate for class certification under their counterparts of Rule 23(b)(3). *See, e.g., Stevens v. Thomas*, 361 S.E.2d 800, 804 (Ga. 1987); *Lance v. Wade*, 457 So.2d 1008 (Fla. 1984). These courts have rejected class certification because of numerous individual issues inherent in such claims, including the degree to which each plaintiff relied on the defendant's misrepresentation, the extent of any economic and non-economic losses caused by the fraud, and the nature of particular representations made to the plaintiffs.

[9] *Cf. Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 634 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) (certification under (b)(2) limited to injunctive relief to protect opt out with respect to claims for damages); *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. 1981) (class members allowed to opt out of (b)(2) class action on ground that, when individual monetary relief is sought, class "begins to resemble a 23(b)(3) action and there has been more concern with protecting the due process rights of the individual class members . . . "); *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983) (opt out provided in class action certified pursuant to 23(b)(2) when class members had unique claims for monetary damages).

This case exemplifies how defendants such as Liberty National, who are seeking to eliminate numerous damage claims in a single action, with the aid of a friendly plaintiff's attorney, can manipulate and abuse the class action device to the detriment of class members by offering to settle a damages class action on the condition that the settlement be fashioned so that the class purports to be a mandatory class under Rule 23(b)(2). *See* Br. Trial Lawyers for Public Justice at 13. Liberty National is adept at manipulating the class action procedure; it has utilized mandatory classes to foreclose monetary damage claims arising out of its alleged fraud in the past[10] and obviously hopes to do so in the future.

B. Under *Mathews v. Eldridge*, Petitioners' individual *in personam* claims for monetary damages cannot be foreclosed without their consent.

Application of the *Mathews v. Eldridge* test demonstrates that due process is violated unless the absent members of this class are afforded the right to opt out to

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[10] *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499 (N.D.Ala. 1991), *aff'd per curiam*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied sub nom. Taylor v. Liberty National Life Ins. Co.*, 509 U.S 906 (1993) (mandatory class disposing of fraud claims arising out of burial policies).

pursue their individual money damages claims.[11] Respondents' arguments to the contrary are unavailing.

1. Respondents concede that a chose in action, such as the fraud claim of each class member against Liberty National, is a protected property interest. They then attempt, unsuccessfully, to shift the Court's focus away from class members' *in personam* monetary claims which are foreclosed by the settlement. Liberty National argues that the "manner of deprivation" of Petitioners' property interests does not implicate due process because Petitioners merely were required to submit their claims for adjudication and Petitioners' claims were not randomly "surrendered for [no] value." L.N. Br. at 35. Surely, due process is implicated by a settlement which *extinguishes* class members' *in personam* claims for monetary damages yet provides *no* monetary compensation for their out-of-pocket losses and requires class members to *continue* to pay fraudulently inflated premiums to the wrongdoer in order to obtain any "relief" at all.

The issue is not merely that Petitioners received a lesser amount in settlement than they wanted, but that Respondents imposed a form of relief not sought by Petitioners, nor by Class Counsel initially, in order to foreclose Petitioners' monetary claims. Liberty National's attack on Petitioners' punitive damage claims, in a continuing effort to miscast

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[11] Liberty National's unsupported assertion that this Court should apply the approach used to assess validity of a rule of criminal procedure in *Medina v. California*, 505 U.S. 437 (1992), in civil cases ignores both this Court's express rationale in *Medina* for not applying *Mathews* in the field of criminal law (the Due Process Clause has limited application beyond the constitutional guarantees in the Bill of Rights which are specific to criminal procedure) and this Court's affirmation in *Medina* of the *Mathews* test as "a general approach" for challenging state procedures in non-criminal contexts. 505 U.S. at 444.

Petitioners as "lottery players," similarly fails to diminish Petitioners' property interest in their *in personam* claims for monetary damages, including their out-of-pocket losses for the fraudulently inflated premiums (1) for the new policies and (2) as a result of being shifted into older age bands. (Pet. Br. at 23-24).

Robertson attempts to shift the focus away from Petitioners' individual damage claims by arguing that Petitioners are really claiming a "liberty" interest in control that is limited to "choice of forum" and "choice of representation." (Rob. Br. at 38). While Petitioners do assert those interests, Petitioners' fundamental concern is that, unless individual claimants can present individual proof regarding their damage claims, there is a very high risk of erroneous deprivation of class members' *property rights* in their causes of action, because claims for damages raise inherently individual, heterogenous issues. The core issue is not simply "control" but also preservation of a property right.

2. With respect to the second *Mathews* factor, Liberty National again relies on the state court findings and the "procedural safeguards" of class actions generally in support of its otherwise untenable position. As Petitioners discussed in their brief (Pet. Br. at 25-31), this case exemplifies how the "procedural safeguards" touted by Liberty National are insufficient to ensure that class members receive due process. Without the right to opt out there are no effective checks[12] on defendants who

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[12] Liberty National's suggestion that the "review" of the settlement by class members is a "check" on erroneous deprivation is ludicrous. (L.N. Br. at 39). Similarly, if Petitioners attempted to collaterally attack adequacy of representation in a separate proceeding (*id.*), Liberty National would vigorously assert the trial court's anti-suit injunction (Pet. App. 101a-02a) and argue waiver. *See Martin v. Drummond Co.*, 663 So.2d 937 (Ala. 1995), *cert. denied*, 116 S.Ct. 1040 (1996).

want to foreclose all damages claims, or friendly class counsel,[13] or courts anxious to dispose of litigation, to prevent the erroneous deprivation of class members' property interests in their individual claims for damages.

Contrary to Robertson's assertion, the evidence overwhelmingly shows that Petitioners are more likely to obtain a favorable result as individual plaintiffs than as members of this class. Reimbursement of Petitioners' out-of-pocket losses alone would be a far a more favorable result than the class "relief" which forces Petitioners to continue to pay fraudulently inflated insurance premiums to Liberty National in order to obtain any "relief" at all. Robertson's suggestion that damages in this case can be assessed "mechanically" (Rob. Br. 43-44) is patently untrue. Here there are individual issues with respect to (1) the amount of the fraudulently inflated premiums paid as a result of the shift in age bands, (2) the extent of mental anguish damages suffered by each class member and (3) additional individual issues with respect to class members who had cancer.

Absentees in class actions are guaranteed a series of protections by the Constitution, including notice, adequate representation and the opportunity to opt out, 311 U.S. at 42-3; 472 U.S. at 811-12. Taken together, these rights provide far more protection than any one of them separately. *Cf. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176, n.13 (1974) (notice and opt out rights cannot be omitted on the ground that adequate representation is sufficient to protect absentees' rights under Rule 23). The

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[13] In its attempt to distance itself from cases in which settlement was reached prior to certification, *e.g. Amchem Products v. Windsor*, 83 F.3d 610 (3d Cir.), *cert. granted*, 117 S. Ct. 379 (1996), Liberty National ignores the evidence that a settlement in principle was reached prior to certification in this case. (Pet. Br. at 8-9 n.7).

right to opt out of a case foreclosing predominately claims for monetary damages is an essential "check" in this group of protections to ensure that the class representative fairly and adequately protects the class and that the trial court adequately supervises the litigation. Neither Respondent has articulated any interest of the private parties or the state in avoiding opt outs which outweighs the interest in preventing erroneous deprivation of class members' monetary claims.

Liberty National's most specious argument is that allowing an opt out would somehow vitiate the settlement. As noted previously, Alabama has a procedure to address multiple punitive damages awards. The "pernicious" result here is that class members' claims for their out-of-pocket losses and other monetary damages are extinguished and the only way they can obtain any "relief" is to continue to pay fraudulently inflated insurance premiums to the company which defrauded them.

Liberty National's argument that it might be subjected to "incompatible standards of conduct" because of the claims of policyholders who objected to the inequities created in pooling insurance premiums as a result of the exchange programs illustrates the inherent problems in certification of this class. Policyholders like Petitioners, whose policies were exchanged and who incurred out-of-pocket losses, are entitled to seek reimbursement of their monetary damages, as illustrated by the cases filed outside the class, including those filed by class counsel.

Liberty National's argument that, if opt outs are required, no class action would ever be settled is groundless. Both the Federal and Alabama Rules require opt outs in money damages cases certified under Rule 23(b)(3). Thousands of class action cases are settled pursuant to Rule 23(b)(3) with opt out provisions. As Petitioners point out in their brief, few class members opt out of such

cases, which demonstrates the effectiveness of the opt out procedure as a check on the fairness and adequacy of the class representative's representation.

While the government certainly has an interest in efficiently resolving litigation, that interest does not outweigh the risk of erroneous deprivation of class members' property interest in their fraud claims for monetary damages. As this Court in *Shutts* and the drafters of the Federal Rules of Civil Procedure have recognized, in a class action foreclosing claims predominately for money damages, the right to opt out is the most effective safeguard to ensure that class members receive adequate representation and a fair and just result.

C. The historical development of class actions demonstrates that due process requires a right to opt out in class actions seeking to bind plaintiffs with respect to *in personam* claims for damages.

Contrary to the repeated suggestions of Respondents, the historical use of the mandatory class action device does *not* support its application in this case. Instead, careful review of the relevant common law precedents, including those relied upon by Respondents, confirms that due process prohibits the classwide elimination of Petitioners' *in personam* damages claims without their consent.

While it is correct that the class action "has deep roots in Anglo-American jurisprudence," L.N. Br. at 43, those roots have never been extended to choke off the due process rights of claimants asserting individual claims for *in personam* damages against a solvent defendant. Rather, to the extent mandatory classes have historically resolved claims for monetary relief, they have done so only in the *in rem* context, where multiple claimants

assert rights against a limited fund. *See Christopher v. Brusselback*, 302 U.S. 500, 504 (1938) (limiting binding effect of class actions to cases "affecting [class members'] interest in property within the jurisdiction of the court"). In this context, a limited fund is "a fixed asset or piece of property . . . in which all class members have a preexisting interest. . . . Classic illustrations include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, [and] proceeds of a ship sale in a maritime accident suit." Herbert B. Newberg & Alba Conte, 1 *Newberg on Class Actions* § 4.09 at 4-32-33 (3d ed. 1992). Virtually all of the cases relied on by Respondents and *amici* involved *in rem* claims against a limited fund. *See, e.g., Smith v. Swormstedt*, 57 U.S. 288 (1854) (claims for allocation of church fund); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) (declaratory judgment regarding disposition and control of trust funds held by fraternal benefit association).[14]

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[14] The only exception, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), is inapposite because the potential, unidentified *in personam* claims released in that proceeding were ancillary to the Court's primary objective of settling claims against a trust. *Id.* at 311-13. In light of the "vital interest of the State in bringing any issues as to its fiduciaries to a final settlement," *id.* at 313, the Court held that it would not construe the Due Process Clause so as to place impossible or impractical obstacles in the way of achieving that state interest, *id.* at 313-14. Thus, even if potential claims against the trustee for "improper management of the common trust fund," *id.* at 311, could be considered "*in personam*," since those claims were derivative of *in rem* claims against the trust itself, they could be extinguished as part of the final settlement of the trust. Here, there is no such "vital interest of the State" requiring the release of class members' claims against Liberty National, and those claims are in no way derivative of *in rem* claims requiring a final accounting.

Professor Chafee, upon whom Respondents and *amici* rely heavily to support use of a mandatory class here, even acknowledges that class actions were historically limited to the *in rem* context:

> It is a *cardinal principle* of such class suits that the omitted members must be interested in the subject matter of controversy in the same way as their representatives. If all the members are connected similarly with land or money within the jurisdiction, the court of equity can then consider the property rather than the owners in reaching its decree. . . . On the other hand, *if the enjoined persons have special claims or liabilities, their rights are personal and can not be concluded in their absence.*

Zechariah Chafee, *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297, 1308 (1932) (emphasis added). Chafee's "cardinal principle" that *absent* parties cannot be bound by the actions of a representative in a class action with respect to their claims for *in personam* damages stands in contrast to his expansive view of the jurisdictional reach of courts of equity to grant "bills of peace." The critical difference stems from the fact that the bill of peace, unlike the class action, did *not* always depend on the principles of virtual or vicarious representation, but in some instances was used merely to assert jurisdiction over multiple claimants while still providing *every individual claimant* notice and an opportunity to present his or her claim as to any individual issues. *See* Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of General Telephone v. Falcon*, 54 Ohio St. L. J. 607, 615 (1993).

The historical restriction on the use of mandatory class actions to resolve claims for monetary relief to the *in rem* context is no "accidental limitation," *see* Rob. Br. at 35, but, like the *Mathews* test, reflects the need to protect

claimants seeking *in personam* damages from erroneous deprivation of their constitutionally protected property interests in their causes of action. With respect to claims asserted against a true limited fund, the underlying substantive rights of each individual claimant are constrained not only by the size of the fund itself, but also by the rights asserted by competing claimants to the same fund. In that instance, each competing claimant is substantively entitled to no more than his or her *pro rata* share of the fund, and adjudication of those rights requires the court to assess all of the claims in one proceeding.[15]

In sharp contrast, however, the substantive rights of plaintiffs asserting *in personam* claims for damages against a defendant that is not in bankruptcy or receivership are wholly unconstrained by the rights of competing claimants. Claims such as Petitioners' are separate and independent, and the interests and issues raised by such claims are heterogenous. Moreover, the tort laws of Alabama and every other state provide that judgments for damages are enforceable *in full* upon becoming final, and competing claimants have no right to assert any claim to a *pro rata* share of such judgments.

Moreover, in this case the trial court certified this action under Alabama Rule 23(b)(1)(B) *after* the settlement fairness hearing, *without* hearing *any* evidence that the claims asserted were substantially likely to exhaust Liberty National's assets, and *without* any notice to class

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[15] If Liberty National were to enter bankruptcy or receivership, the underlying nature of the substantive rights of competing claimants would be altered. *See Katchen v. Landy*, 382 U.S. 323, 336 (1966) ("[t]he Bankruptcy Act . . . converts the creditor's legal claim into an equitable claim to a pro rata share of the res").

members that such certification was even being considered. Such a nonadversarial, standardless, seat-of-the-pants procedure is destined to result in an "erroneous deprivation" through a wrongful conclusion that class members' claims will render Liberty National insolvent.

CONCLUSION

The holding of The Alabama Supreme Court should be reversed, and Petitioners should be allowed to opt out of the class settlement.

Respectfully submitted,

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ATLA has declared its position regarding class actions in a formal resolution adopted by its Board of Governors on Oct. 5, 1996:

> Class actions can be important procedural vehicles utilized by consumers and others to halt and deter wrongful conduct. However, class actions have the potential to affect individual rights, and potentially may interfere with an individual plaintiff's exercise of the right to legal counsel and the right to trial by jury. . . .
>
> ATLA believes . . . that any waiver of the right to a jury trial should be a knowing and informed choice of the plaintiff [and] that plaintiffs are entitled to counsel of their choice whose loyalty is undivided by any conflict of interest. Accordingly, ATLA opposes the implementation of class action procedures unless each claimant is afforded the fullest opportunity to exercise a knowing and intelligent waiver of jury trial and a meaningful opportunity to opt out of the binding effect of such proceedings.

In ATLA's view, the class certification and settlement approved by the Alabama court in this case is an example of the danger that individual rights may be sacrificed in the effort to resolve a large number of claims. Indeed, in order to achieve settlement in this case, the causes of action of objecting plaintiffs were effectively kidnapped and turned into mere administrative claims under the mandatory settlement.

ATLA submits that affording class members the opportunity to opt out of the class as a matter of procedural due process will safeguard the rights of the class members while preserving -- indeed, enhancing -- the effectiveness of the class action as a means of resolving disputes in a just and efficient manner.

SUMMARY OF THE ARGUMENT

Plaintiffs in this case, as victims of an alleged fraud on the part of Liberty National, possessed an accrued cause of action for money damages against the company. This Court has recognized that a vested cause of action is a species of "property" protected by the Due Process Clause of the Fourteenth Amendment. Access to justice has also been recognized by this Court as implicating a liberty interest protected by the due process guarantee. The fact that the Alabama Constitution itself guarantees open courts and a right to a remedy for those with vested rights requires that plaintiffs not be deprived of their causes of action without due process.

Whether due process requires that plaintiffs seeking monetary damages be afforded the procedural safeguard of the right to opt out of a class action is determined by the balancing of the interests of plaintiffs against any burden on governmental interests.

Plaintiffs' property interest is of great weight and importance because, by extinguishing their cause of action, the Alabama court erased plaintiffs' right to present their claims in a jury trial and their right to counsel of choice. The right to trial by jury in civil cases is deemed so fundamental that it was constitutionally guaranteed by the Seventh Amendment and has been scrupulously guarded against infringement by this Court. Although the Seventh Amendment has not been incorporated into the Fourteenth Amendment, its fundamental importance to the American civil justice system is a measure of the importance of the property interest of which plaintiffs were deprived.

Additionally, class certification deprived plaintiffs of the right to counsel of their choice to pursue their claims. This right includes the right to counsel whose loyalty is undivided by any conflict of interest, unless it is voluntarily waived by the client. This is particularly important in class actions

involving individual claims for money damages, which inherently present potential conflicts among members of the class and a serious possibility of collusion between class counsel and defendant.

A determination that plaintiffs are adequately represented by the class representatives and class counsel is not sufficient to protect plaintiffs' property interest. The rights to trial by jury and counsel of choice are individual rights that serve values of autonomy and fairness separate from the amount of damages obtained. By their very nature, these rights cannot be protected by "representatives" without plaintiffs' consent.

The value of the opt-out as a procedural protection is suggested by Rule 23 itself, which requires that members of a class certified under Rule 23(b)(3) be afforded the opportunity to exclude themselves from the class. This Court has indicated that the right to opt out serves as a means of obtaining consent or waiver by plaintiffs whose due process rights are infringed. A number of courts have recognized the unfairness of denying this choice to plaintiffs with monetary claims. Those courts have held that such plaintiffs should be afforded the right to opt out, either as a matter of due process or as an appropriate exercise of judicial discretion.

Finally, the governmental interest in denying this procedural safeguard to plaintiffs with claims for money damages is slight. Since the right to opt out is mandatory in class actions certified under Rule 23(b)(3), there is no discernible governmental interest in denying opt-out rights to those with monetary claims classified under (b)(1) or (b)(2). Indeed, the possibility that plaintiffs might leave the class advances the government's interest by providing an added incentive for adequate representation and equitable treatment of all members of the class. There is no legitimate governmental interest in prohibiting opt outs in order to prevent large numbers of claims from depleting a defendant's assets. Congress has already provided a means of addressing this issue in the Bankruptcy Act. Defendants should not be

permitted to use a mandatory class action as an "end run" around the Bankruptcy Code, which provides greater protection of tort creditors.

ARGUMENT

I. DENYING MEMBERS OF A CLASS SEEKING MONEY DAMAGES THE OPPORTUNITY TO OPT OUT OF THE CLASS ACTION DEPRIVES THEM OF INTERESTS PROTECTED BY THE DUE PROCESS CLAUSE.

A. Certification Of The Class Action As A Mandatory Non-Opt-Out Class Extinguished The Individual Causes Of Action Of Plaintiffs.

Amicus addresses this Court with respect to a single issue in this case: Whether members of a plaintiff class with claims seeking money damages are entitled to an opportunity to opt out of the class action as a matter of due process. Amicus submits that denying such plaintiffs the choice to pursue individual actions effectively extinguished their vested rights in violation of the Due Process Clause of the Fourteenth Amendment.

Plaintiffs in this case are people who bought "cancer insurance" which Liberty National had sold since the 1960's. During 1987-88, in an effort to limit its exposure and reduce payments, defendant persuaded policyholders to switch to a "better" policy that provided added coverage. Allegedly, Liberty National agents failed to tell policyholders that the new policies imposed severe limits on payments for covered treatments. Policyholders found themselves paying higher premiums for lower coverage.

These policyholders clearly had a vested and viable cause of action for damages against Liberty National. Indeed, a number of them brought suit, and the Alabama Supreme Court held their allegations sufficient to state a cause of

action for fraud, regardless of whether the policyholders had actually made a claim under the policy. *Boswell v. Liberty National Life Ins. Co.*, 643 So. 2d 580 (Ala. 1994). It is also clear that plaintiffs were entitled to a jury trial on their claims. In fact, in October 1993, a jury found Liberty National liable for fraud, awarding damages to the policyholder. The Alabama Supreme Court affirmed. *Liberty National Life Ins. Co. v. McAllister*, 675 So. 2d 1292 (Ala. 1995).

At about the same time, a class action was filed in Alabama state court on behalf of all policyholders who had exchanged their policies. Liberty National and class counsel negotiated a settlement of this action. On May 26, 1994, a Circuit Judge issued an Order and Final Judgment which both certified the class and approved the settlement. The Order explicitly prohibited class members from opting out of the class and required class members to release all pending and future claims against the company. Plaintiffs who had objected to the certification appealed.

The Alabama Supreme Court upheld the order. *Adams v. Robertson*, 676 So. 2d 1265 (Ala. 1995). The Court determined that certification complied with Ala. R. Civ. Pro. 23. That rule is identical to Fed. R. Civ. Pro. 23 and Alabama courts "consider federal case law on class actions to be persuasive authority." 676 So. 2d at 1268. The court found no abuse of discretion by the Circuit Judge in certifying the class under Rule 23(b)(1)(A), (b)(1)(B), or (b)(2) which, like their federal counterparts, do not require that class members be permitted to opt out of the class action.

The court's opinion addressed only the propriety of certifying the class action under Rule 23(b)(2). It noted that the class action complaint included pleas for an injunction against the policy exchange program, restitution of lost benefits, reformation of new policies to eliminate limitations, reinstatement of lapsed policies and other injunctive relief. *Id.* at 1270. The court rejected the objectors' contention that the Circuit Judge should have certified the class under Rule

23(b)(3). "So long as the relief sought is *primarily* equitable or injunctive, a class action settlement that also includes money damages with a mandatory non-opt-out provision is proper." *Id.* at 1271. (emphasis in original)

The result was that over 200,000 policyholders whose policies had been exchanged for worse policies, learned that their individual causes of action had been "exchanged" for membership in a class from which they could not escape. They learned that the class action was settled on terms which gave no money damages to 99.75% of the class.

B. An Individual Cause Of Action Is A Form Of Property Protected By The Due Process Clause.

1. Plaintiffs Have a Property Interest in a State-Created Cause of Action

Plaintiffs' cause of action for fraud, though it arises under state law, is protected by the Due Process Clause. One of this Court's earliest pronouncements declared that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). This right of access to justice is so fundamental that this Court has located "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" in the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

This Court had occasion to reaffirm this right of access to justice in a case where state procedure extinguished a state-created cause of action in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Logan had brought an action under the Illinois Fair Employment Practices Act, alleging that his employer had fired him because of his physical disability. The statute required a determination by the Illinois Fair Employment Practices Commission as to whether there was

substantial evidence of discrimination. When the Commission failed to act within the 120-day period set by the Act, the Illinois Supreme Court held that the time limit was jurisdictional and Logan's cause of action was extinguished.

This Court reversed, holding that Logan was entitled to present the merits of his case. Justice Blackmun wrote:

> The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. . . . [T]he Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]."

455 U.S. at 429-30, quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

That a plaintiff's cause of action is a protected interest, Justice Blackmun wrote, "was affirmatively settled by the *Mullane* [*v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)] case itself, where the Court held that *a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause*." 455 U.S. at 428 (emphasis added). *See also Martinez v. California*, 444 U.S. 277, 281-282 (1980)("Arguably," a state tort claim is a "species of 'property' protected by the Due Process Clause."). Having created a cause of action, the Court declared, the State "may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." 455 U.S. at 432.

2. Plaintiffs' Property Interest Is Guaranteed by Alabama's Constitutional Right to a Remedy.

It was of particular import in *Logan* that under the Illinois statute, "A claimant has more than an abstract desire

or interest in redressing his grievance: his right to redress is guaranteed by the State." 455 U.S. at 431. In this case, the plaintiffs' right to access to a judicial remedy is explicitly guaranteed by the Alabama constitution:

> That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

Ala. Const., Art. I, sec. 13.

This provision, which traces its origin to the Magna Carta, has been incorporated into the constitutions of 39 states. David Schuman, *The Right to a Remedy*, 65 Temple L. Rev. 1197, 1199-1201 (1992). Some states have applied the provision expansively as a check on legislative limits on common law remedies. *See e.g., Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988); *Lucas v. United States*, 757 S.W.2d 686 (Tex. 1988). *See generally*, David R. Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 Okla. L. Rev. 195 (1985); Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579, 615 n.218 (1981).

Even among the states construing this provision narrowly, there is common agreement that "vested rights may not be disturbed." Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202, 1205 (1964). The Alabama Supreme Court has construed Art. I, sec. 13 as protecting "vested rights." *Reed v. Brunson*, 527 So. 2d 102, 114-15 (Ala. 1978).

C. An Individual Cause of Action is a Liberty Interest Protected by the Due Process Clause.

Viewing the erasure of a plaintiff's cause of action through a different due process lens, it is clear that the

Alabama court's action also implicates a liberty interest under the Fourteenth Amendment.

This Court's decisions striking down state restrictions on providing legal services to potential plaintiffs have recognized that "meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971). Underscoring the importance of this right, the Court has declared that no law can pass constitutional muster if it bars the people "from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped." *Brotherhood of Railway Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7 (1964).

The vindication of rights that the Court comprehends within this constitutional protection includes the full range of civil wrongs. *Trainmen* involved union assistance to workers injured on the job in obtaining legal representation. The Court acknowledged that "one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.'" *United States v. Burke*, 112 S. Ct. 1867, 1871 (1992), quoting *Carey v. Piphus*, 435 U.S. 247, 257 (1978).

Plaintiffs, like Logan, possessed a vested cause of action that was extinguished by the court's certification of the class action as mandatory non-opt-out. Like Logan, plaintiffs are not challenging the court's error, "but the established state procedure that destroys his entitlement without according him proper procedural safeguards." 455 U.S. at 436. Having established that the ruling deprived plaintiffs of an interest protected by the Due Process Clause, Amicus turns to the question of what process is due.

II. PROCEDURAL DUE PROCESS DEMANDS THAT CLASS MEMBERS WITH CLAIMS FOR MONETARY DAMAGES BE AFFORDED A MEANINGFUL OPPORTUNITY TO OPT OUT OF THE CLASS.

Whether due process requires class members to be afforded an opportunity to exit the class is answered by the familiar balancing of interests set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

> The *Mathews* analysis requires us to consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose.

United States v. James Daniel Good Real Property, 510 U.S. 43, 52 (1993).

A. The Interests Extinguished By The Alabama Court Affect Important Rights.

The balancing test prescribed by *Mathews* requires an assessment of the importance of the protected interest at stake. In this case, Amicus submits, the property and liberty interests are of overwhelming significance because they affect fundamental individual rights.

At the outset, it might be suggested that the Alabama court did not completely extinguish plaintiffs' causes of action, but rather exchanged them for membership in the class. Setting aside the understandable dismay with which the plaintiffs might view yet another "exchange," the fact is that their causes of action trigger important rights: the right to trial by jury and counsel of choice. These rights *are* extinguished completely by the court's ruling.

It is Amicus' conviction that these rights are so fundamental that their infringement in the absence of a

compelling state interest cannot stand. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 & 38-39 (1972)(strict scrutiny of laws touching upon fundamental rights); *Boddie v. Connecticut*, 410 U.S. 371, 375-76 (1971)(recognizing fundamental right to access to civil litigation which is "the only effective means of resolving the dispute at hand."); and note 2, *infra*.

Even if this Court is hesitant to declare that the right to jury trial and counsel of choice are fundamental rights, Amicus submits that their importance adds considerable weight to the plaintiffs' side of the *Mathews v. Eldridge* balance.

1. Certification of the Mandatory Class Eliminated Plaintiffs' Right to Trial by Jury on Their Claims for Monetary Damages.

The property interest which was taken from plaintiffs was not money or personalty, but a vested cause of action. Bundled with that interest was the right to present their case to a jury. On May 26, 1994, without any waiver on plaintiffs' part, the Alabama court simply made that right disappear.

The Alabama Supreme Court held that certification did not violate plaintiffs' state constitutional right to a jury trial under Ala. Const. Art. 1 sec. 11. The court reasoned that so long as the court complied with the procedures to find that the absent plaintiffs were adequately represented by the class representatives, "the absent class members have had their day in court," albeit vicariously. 676 So. 2d at 1272. Significantly, this Court in *Logan* emphasized:

> Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."

455 U.S. at 432, quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980).

In federal courts, in cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial.[1] *Lorillard v. Pons*, 434 U.S. 575, 583 (1978); *Curtis v. Loether*, 415 U.S. 189, 195-198 (1974). Even "where equitable and legal claims are joined in the same action there is a right to a jury trial on the legal claims which must not be infringed by trying the legal issues as incidental to the equitable ones." *Ross v. Bernhard*, 396 U.S. 531, 537-38 (1970).

Amicus does not argue that the Alabama court violated the Seventh Amendment itself. This Court has not held that the Seventh Amendment right to trial by jury is incorporated into the Fourteenth Amendment Due Process Clause.[2] Rather, the importance of jury trial to our civil justice system, the value which the Seventh Amendment protects, is a measure of the importance of the property interest which plaintiffs lost. It is therefore a measure of what process is due before plaintiffs may be deprived of their property interest.

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1 In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend VII.

2 Alternatively, Amicus suggests that this Court affirmatively rule that the Due Process Clause of the Fourteenth Amendment incorporates the Seventh Amendment right to trial by jury, making that right applicable to the states. That this right is fundamental to Anglo-American law is clear from its historical roots in this country and from the fact that the right is explicitly guaranteed by most state constitutions. Amicus suggests that the right to trial by jury in civil cases is as "fundamental to the American scheme of justice" as the Sixth Amendment right to jury trial in criminal cases incorporated into the Fourteenth Amendment in *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)

Denial of the colonists' right to trial by jury was a primary grievance against the King, ultimately leading them to break free of England. Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993). Only after a commitment was made to include this right in a bill of rights could the Constitution win ratification. *See* Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (R. Rotunda & J. Nowak eds. 1987)(1833); Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-60 (1991). As this Court has stated:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1953).[3] "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption," *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979)(Rehnquist, J., dissenting), and the right to trial by jury is guaranteed by virtually every state constitution.

Of particular significance in this case is the fact that the American colonists complained bitterly of efforts by the Crown to shift the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals. *See* Carl Ubbelohde, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 209-11 (1960); Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 69-72 (1957);

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[3] *See also Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943) ("The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence."); *Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484, 492 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded.").

Parklane Hosiery, supra, 439 U.S. at 340 (Rehnquist, J., dissenting). In view of this history, this Court has declared that:

> Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attached and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 61 (1989). "[N]or can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal." *Id.* at 51-52.

Yet this is precisely what certification of the class action accomplished in this case. By a perverse alchemy, certification of the class action and settlement transformed plaintiffs' common law damage claims, which included the right to trial by jury, into administrative claims which did not. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985)(referring to class action as a "quasi-administrative proceeding").

2. Certification of the Mandatory Class Eliminated Plaintiffs' Right to Counsel of Choice

Of crucial importance in this case is the client's right to an attorney whose loyalty is undivided and uncompromised. The ethical rules governing the profession, for example, require that any conflict of interest be disclosed to the client, who may seek other representation or waive any objection. *See* ABA Model Rules of Professional Conduct Rule 1.7(b)(conflicts of interest); Rule 1.3 (duty to be diligent in representation of client).

An inherent problem in class actions is the fact that class counsel, charged with representing the class, necessarily has no obligation of loyalty to individual members of the class. As a jurist with considerable class action experience has noted, where class members seek monetary damages for individual wrongs, there are serious potential conflicts of interest among

class members and between class counsel and the class. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. L. Rev. 469, 502-06 (1994). For example, such class actions present "a built-in conflict of interest for the class attorney, who can obtain a generous award of attorney's fees, and perhaps equally generous relief for a few named plaintiffs and members of the class, by compromising the interests of absent class members through preclusion of their claims. George Rutherglen, *Better Late Than Never: Notice And Opt Out At The Settlement Stage Of Class Actions*, 71 N.Y.U. L. Rev. 258, 260 (1996). As a practical matter, it has been pointed out, those class members whose interests do not coincide with the class representatives or the class attorney are effectively "unrepresented." Brian Wolfman and Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U.L. Rev. 439, 441 (1996).

Placing monetary claims into the class action setting gives rise to serious potential problems of collusion. Not only is there a potential for overt illicit agreements -- payment to counsel from defendants in excess of an arm's length fee agreement in return for payments to the class below what they might otherwise obtain. Class actions also present what one scholar terms "structural collusion." That is, the interests of class counsel tend to become aligned with those of the defendant, to the detriment of class members, even without overt agreement. *See generally*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343 1364-73 (1995).

For example, "defendants' ability to select plaintiffs' lawyers in this manner often sets up a 'reverse auction' in which defendants seek to identify the plaintiff's lawyer who will submit the lowest plausible settlement offer on behalf of the plaintiff class. The incentives involved may overwhelm the judgment of otherwise highly ethical lawyers." Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 826

(1995); *see also* John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 Cornell L Rev. 851, 853 (1995).

Amicus intends no criticism of class counsel in this case and does not support any suggestion in the briefs of either party that class counsel acted less than ethically. Nevertheless, the fact that a class member cannot fire his or her attorney eliminates an important check against the inherent potential for abuse. Amicus agrees that "[p]rocedures that allow class members to exit in response to inadequate representation of their interests directly address this problem." George Rutherglen, *supra*, 71 N.Y.U. L. Rev. at 281. Indeed, the very possibility that a significant number of class members will "vote with their feet" provides a healthy countervailing incentive for both class counsel and the defendant to treat class members equitably.

B. Affording An Opportunity To Opt Out Of the Class Action Is the Best Means Of Protecting Plaintiffs' Due Process Interests.

1. Deprivation of Plaintiffs' Rights Cannot be Cured by a Finding of Adequacy of Representation.

The second element in the *Mathews* analysis looks to whether there are alternative means of protecting the individual against deprivation of his or her property interest and "the probable value, if any, of additional procedural safeguards." 424 U.S. at 343.

The Alabama Supreme Court dismissed plaintiffs' state constitutional claims, stating that the absent class members' right to their "day in court" was satisfied because they were adequately represented by the named plaintiffs and class counsel who would be present. 676 So. 2d at 1272.

This Court has stated that a class action does not violate the due process rights of some class members who could not

be given notice where they were adequately represented by the named representatives of the class. *Hansberry v. Lee*, 311 U.S. 42 (1942). Amicus suggests that *Hansberry* stands for the reasonable proposition that the Due Process Clause does not command the impossible, i.e. notification of class members who could not be found. *Cf., Parratt v. Taylor*, 451 U.S. 527, 541 (1981)(due process does not require predeprivation hearing where the deprivation, negligent loss of a prisoner's property, was an unpredictable event).

However, the *Hansberry* Court did not prescribe adequate representation as a cure-all for any and every deficiency of due process. As the Court later explained in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), adequate representation is not the "touchstone of due process in a class action." 417 U.S. at 176. To suggest that adequate representation by itself is sufficient for due process, the Court stated, would "prove too much," leading to the conclusion that notice would never be necessary, provided there was adequate representation of the members of the class. *Id.* at 176-77. In that case, the Court required that notice be sent to over two million class members, specifically so that each would have an opportunity to "request exclusion from the action and thereby preserve his opportunity to press his claim separately." *Id.*

In addition, this Court did not deem adequacy of representation sufficient to protect absent class members in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Instead, the Court held that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the Court." 472 U.S. at 812.

Furthermore, the interests of plaintiffs in presenting their case to a jury and selecting counsel of choice are personal rights, serving values of autonomy.

> The integrity, autonomy and dignity of the person is protected when clients make the decisions affecting their lives. As the owner of a legal claim, the client should have a 'presumptive right of control.' It is 'the client who will have to live with the outcome.'

Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 Syr. L. Rev. 709, 719 (1989) (footnotes omitted).

This Court noted in *Martin v. Wilks*, 490 U.S. 755, 762 (1989), the "deep-rooted historic tradition that everyone should have his own day in court." Tort victims in particular have a "vital interest" in having some measure of control over litigation that may affect their lives. *Yandle v. PPG Indus. Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974); *Causey v. Pan Am World Airways, Inc.*, 66 F.R.D. 392, 299 (E.D. Va. 1975); *Hobbs v. Northeast Airlines*, 50 F.R.D. 76, 79 (E.D. Pa. 1970); Robert G. Bone, *Rethinking the "Day in Court Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev 193, 286-87 (1992). *See also* Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 74 ("the right to control personally the suit whereby a badly injured person seeks redress from the alleged tortfeasor has long been valued both here and in England.").

Studies of litigants themselves reveal that their interest in seeking a jury trial goes beyond the amount of compensation recovered. In one empirical study, for example, claimants whose cases went to trial were more likely to report that that justice and fairness was accomplished, compared to those whose cases were disposed of through arbitration or other means. Deborah R. Hensler, *Resolving Mass Torts: Myths and Realities*, 1989 U. Ill. L. Rev. 89, 99. Significantly, the "most frequently cited objective of lay litigants in adjudicatory proceedings was to 'tell my side of the story.'" *Id.* Other case studies confirm that plaintiffs who seek access to judicial remedies "seek something in addition to money." Judith Resnik, Dennis E. Curtis, Deborah R. Hensler, *Individuals*

Within the Aggregate: Relationships, Representation, and Fees, 71 N.Y.U. L. Rev. 296, 363-72 (1996).

By definition, then, plaintiffs' protected due process interests cannot be enjoyed (or, more accurately relinquished) through representatives. At the least, Amicus submits, adequacy of representation should be based on the consent of those represented. The individual plaintiff in this case, however, is caught up in what one scholar calls the "serious problem of the 'kidnapped rider,' an individual deprived of any freedom of action by being drawn involuntarily into collective litigation." Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 821 (1995).

2. Providing a Meaningful Opportunity to Opt Out of a Class Action Assures that Plaintiffs' Rights Are Set Aside Only On the Basis of Knowing and Voluntary Waiver.

Important though they are, the rights to trial by jury and counsel of choice may be relinquished by knowing and voluntary waiver. Since these rights cannot be preserved within the class action context, Amicus submits that basic fairness requires that plaintiffs be given the choice between going it alone or casting their lot with the class.

The value of opting out as a procedural safeguard, essentially a waiver of rights, is suggested by Rule 23 itself. Rule 23(b)(3), which commonly applies to classes of claimants who seek monetary damages, and whose interests may therefore be divergent, requires that class members be afforded the opportunity to exclude themselves from the class. The absence of such a provision in the other subdivisions of Rule 23 reflects the view of the drafters that the interests of those classes are sufficiently homogenous that an opt-out would be of little use. The Advisory Committee's Note accompanying the 1966 Amendments to Rule 23 states that the (b)(2) subdivision was not intended to "extend to cases in which the appropriate final relief relates exclusively

or predominantly to money damages." By the very nature of a heterogeneous (b)(3) class, there would be many instances where a particular individual might not want to be included as a member of the class. To respect these individual interests, Rule 23 (c)(2) was intended to afford an opportunity to every potential member to opt out of the class. Advisory Committee's Note to Proposed Amendments to Rule 23, 39 F.R.D. 69, 104-05 (1966). *See also, Wetzel v. Liberty Mutual Ins Co.*, 508 F.2d 239, 250-53 (3d Cir. 1975)(right to opt out is not required in injunctive class action because of the homogeneity of class members' interests; it is required in (b)(3) class actions to preclude potentially inadequate representation when plaintiffs have disharmonious interests).

This Court has strongly indicated support for this view, stating, in a case involving money damages, "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the Court." *Phillips Petroleum Co. v. Shutts, supra*, 472 U.S. at 812.

As Rule 23 is drafted, however, some class actions for monetary damages can be deemed to fall within (b)(1) or (b)(2). Indeed, it is a simple matter to add to a complaint seeking money damages a prayer for an injunction against the alleged misconduct. A significant number of courts have recognized the unfairness of denying plaintiffs the opportunity to opt out of a class that could have been certified under (b)(3), but was not. Some have provided this procedural protection as a matter of due process; others as a proper exercise of the court's discretion.

The value of the opt-out as a procedural safeguard of plaintiff's protected interest is reflected in the decisions of a significant number of courts. The Fifth, Eleventh, and Ninth Circuit Courts, have acknowledged that the "opt-out right is required . . . where personal monetary relief is being sought [because] the individual class members may have a strong

interest in pursuing their own litigation." *Penson v. Terminal Transport Co.*, 634 .2d 989, 993 (5th Cir. Unit B 1981). *See also, Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

In *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983) the court went even further and held that "the presence in the lawsuit of a significant number of atypical claims not common to the class activates a requirement that absent class members be given an opportunity to opt out of the class at the monetary stage of the Title VII lawsuit or settlement." 706 F.2d at 1155. "Because the monetary relief stage of this particular Title VII case [was] functionally more similar to a (b)(3) class than a (b)(2) class, the opt out protection of (b)(3) must be applied," even where the monetary claim is equitable in nature. *Id.*

In *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), cert. dism. as improvidently granted, 114 S. Ct. 1359 (1994), where Brown had no opportunity to opt out of class action, the court concluded that "there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata*."). In *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 634-35 (9th Cir. 1982), a Title VII class action certified under subsection (b)(2), the Ninth Circuit allowed an opt-out in part because "[g]iven the breadth and nature of the claims asserted, the class allegations in plaintiffs' complaint, and the procedures adopted by the district court, it appears clear that this case was in essence a Rule 23(b)(3) action."

Other courts have exercised their discretionary powers in certain circumstances to require that 23(b)(2) class members receive notice and an opportunity to opt-out of the litigation. *See In re School Asbestos Litig.*, 789 F.2d 996, 1007 (3d Cir. 1986), cert. denied, 479 US 852 (1986)(court reversed mandatory class action for cost of removing asbestos from schools, although the case continued as an opt-out class action); *In re A.H. Robins*, 880 F.2d 709, 744-45 (4th Cir.),

cert den, 493 U.S. 959 (1989)(although the class action was certified under (b)(1)(A), the district court issued notice to class members and allowed them to present their claims in individual hearings, a procedure the Fourth Circuit deemed equivalent to an opt-out).

See also, Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986)(approving the opt-out procedures in Rule 23(b)(2) class actions as provided for in *Penson* and *Holmes, supra*); *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979)(the opportunity to opt out of the class served to ameliorate any "antagonistic interests" between class representatives and absent members); *Bogard v. Cook*, 586 F.2d 399, 409 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979)(the opt-out right was designed to permit the class members to seek monetary relief in individual actions rather than be limited to the injunctive relief sought in the class action); *DeGier v. McDonald's Corp.*, 76 F.R.D. 125 (N.D. Cal. 1977); *Walker v. Styres Indust.*, 21 Fed. Rules Serv. 2d 355 (M.D.N.C. 1976)(in Title VII class action where both injunctive relief and money damages were sought; the court ordered notice similar to that required by (b)(3)); *Ostapowicz v. Johnson Bronze Co.*, 54 F.R.D. 465, 466 (W.D. Pa. 1972)("in our discretion we do require that such notice be given so that requirements of due process be satisfied and all members . . . be given an opportunity to join or opt out."); *Allen v. Isaac*, 100 F.R.D. 373, 375-77 (N.D.Ill. 1983)(court exercised its discretion under Rule 23(d)(2) to permit class members to opt out, where it concluded that a 23(b)(2) action was, in reality, a hybrid 23(b)(2)-and-23(b)(3) action); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992), appeal dism. 995 F.2d 1066 (6th Cir. 1993)(providing back-end opt-out to class of plaintiffs with claims involving defective heart valve, without limits on recoverable damages).

C. Governmental Interest Favors Extending Right To Opt Out To Members Of Class Action Certified Under Rule 23(B)(1) And (B)(2) Who Claim Monetary Damages.

Against the weighty interests of the class members, under the *Mathews* analysis, must be balanced "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

1. Affording Class Members Seeking Monetary Damages The Opportunity To Opt Out Of The Class Imposes Minimal Burden On The State.

The government clearly has no general interest against affording the opportunity to opt out to class members seeking monetary damages. Indeed, Rule 23(b)(3) explicitly requires this procedural safeguard in many such cases. The appropriate inquiry is whether any legitimate government interest is affected by extending this right to plaintiffs seeking monetary damages whose claims are sought to be aggregated under (b)(1) or (b)(2).

Such an extension would impose little additional burden on the government. The burden and expense of providing notice to class members and an opt-out form is borne by the parties. Moreover, it may be anticipated that in most class actions that are conducted fairly and equitably, relatively few members would choose to opt out. A study by the Federal Judicial Center of Class Actions in four federal district courts found that the median percentage members of (b)(3) classes who opted out was 0.1 to 0.2%. *See* Thomas E. Willging, Laura L. Hooper, Robert J. Niemic, *An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges*, 71 N.Y.U.L. Rev. 74, 135 (1966).

2. Affording Class Members Seeking Monetary Damages The Opportunity To Opt Out Of The Class Advances State Interests.

The prospect that members of the class might choose to "vote with their feet" is likely enhance the effectiveness of the judicial function. Providing the opt-out right in all class actions involving monetary damages avoids protracted legal battles concerning the proper classification of the class action under the subdivisions of Rule 23. The ability of class members to, in effect, fire their attorney, provides an incentive for class counsel to avoid the appearance of collusion, keep fees reasonable, and provide a fair apportionment of any award or settlement. The opt-out also assists the court in its obligation to assess the adequacy of representation. *See* George Rutherglen, *Better Late Than Never: Notice And Opt Out At The Settlement Stage Of Class Actions*, 71 N.Y.U. L. Rev. 258, 282 (1996)(the fact that many class members have opted out may constitute grounds for decertifying the class for reasons of inadequate representation).

The fact that some defendants may refuse to enter into a settlement unless all members of the class are prohibited from pursuing individual actions does not implicate a legitimate governmental interest. Although there may be a public interest in those situations where a large number of individual claims may exceed the assets of the defendant, Congress has already provided a statutory scheme for addressing this problem. Indeed, as a district judge has noted, "the use of subdivision (1)(B) might be seen as an end run around the bankruptcy law, giving the defendant some of the benefits of bankruptcy without its burdens (although even in bankruptcy, an injured plaintiff's right to a jury trial would be preserved.)" William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Cornell L. Rev. 837, 840 (1995). *See, e.g., In Re Joint Eastern and Southern District Asbestos Litigation*, 14 F.3d 726, 732 (2d Cir. 1993)(mandatory class

reversed as "evasion of the exclusive legal system established by Congress for debtors to seek relief.").

Other commentators have pointed out that use of mandatory class actions to impose settlement of tort claims evades some of the protections of tort creditors contained in the Bankruptcy Act, so that such settlements "may serve chiefly to effect wealth transfers from a corporation's tort creditors to its shareholders." John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 Cornell L Rev. 851, 856 (1995). *See also*, George Rutherglen, *Better Late Than Never: Notice And Opt Out At The Settlement Stage Of Class Actions*, 71 N.Y.U. L. Rev. 258, 286 (1996).

* * *

This Court has found that the due process rights of defendants in civil cases are not exhausted even after full-fledged trial on the merits with its panoply of procedural protections. *See Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)(defendant entitled to meaningful judicial review of punitive damage awards); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994)(state courts must provide opportunity for defendant to seek remittitur of punitive damages to avoid "arbitrary deprivation of property.") Surely due process entitles a plaintiff with a vested cause of action to be able to enter the courthouse door and present his or her case to a jury, rather than be swept up into a collective settlement.

CONCLUSION

For the foregoing reasons, Amicus Curiae urges this Court to reverse the judgment of the Supreme Court of Alabama.

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